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In The

Supreme Court of The United States

October Term, A. D. 1942

No. 573

CHARLES M. THOMSON, Trustee of the CHICAGO AND NORTH WESTERN RAILWAY COMPANY (substituted for Charles P. Megan, Trustee),
Petitioner,

vs.

MARY B. SEVIER, ADMINISTRATRIX OF THE ESTATE OF ALBERT E. SEVIER, DECEASED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT, OF THE STATE OF ILLINOIS, AND SUPPORTING BRIEF.

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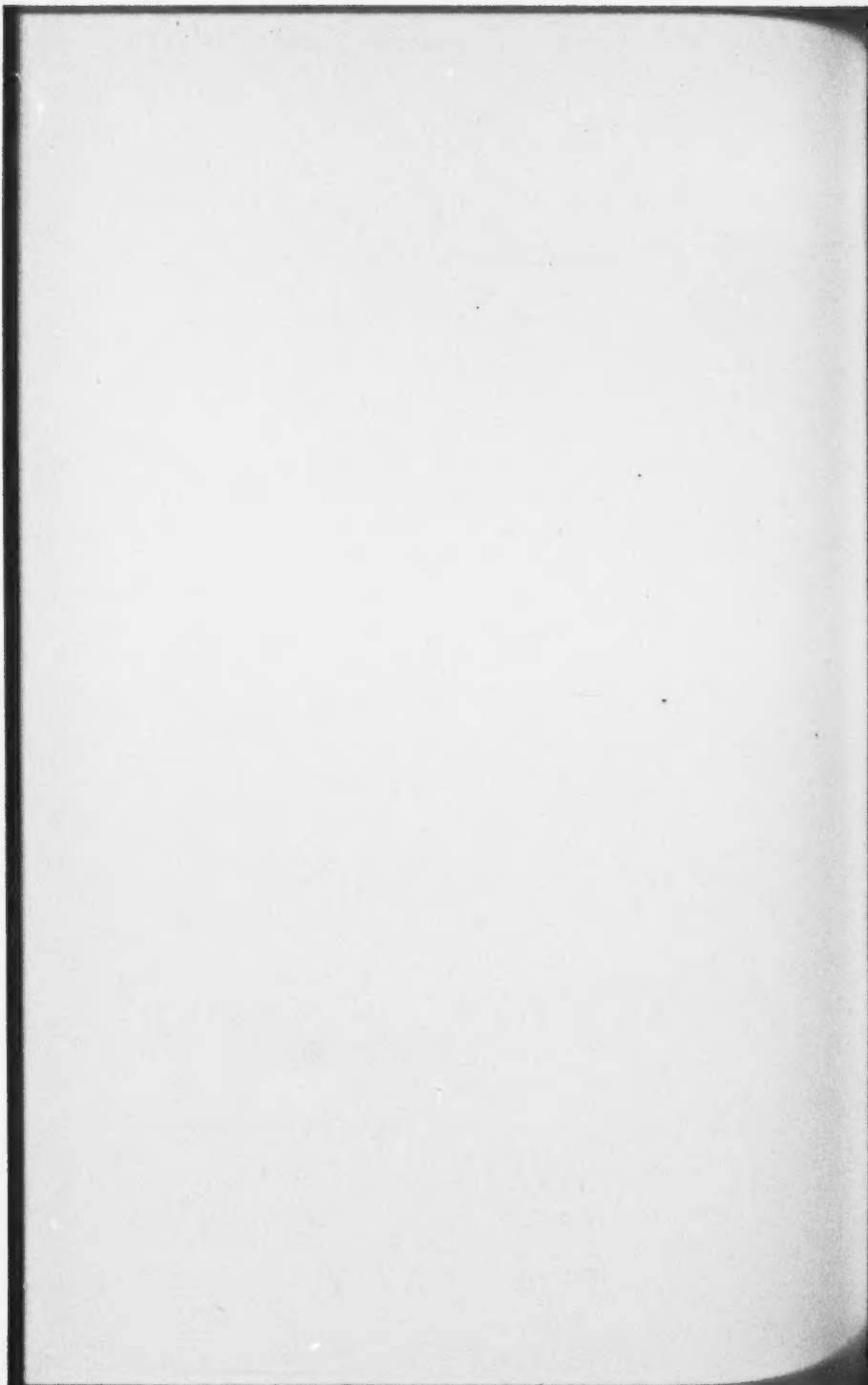

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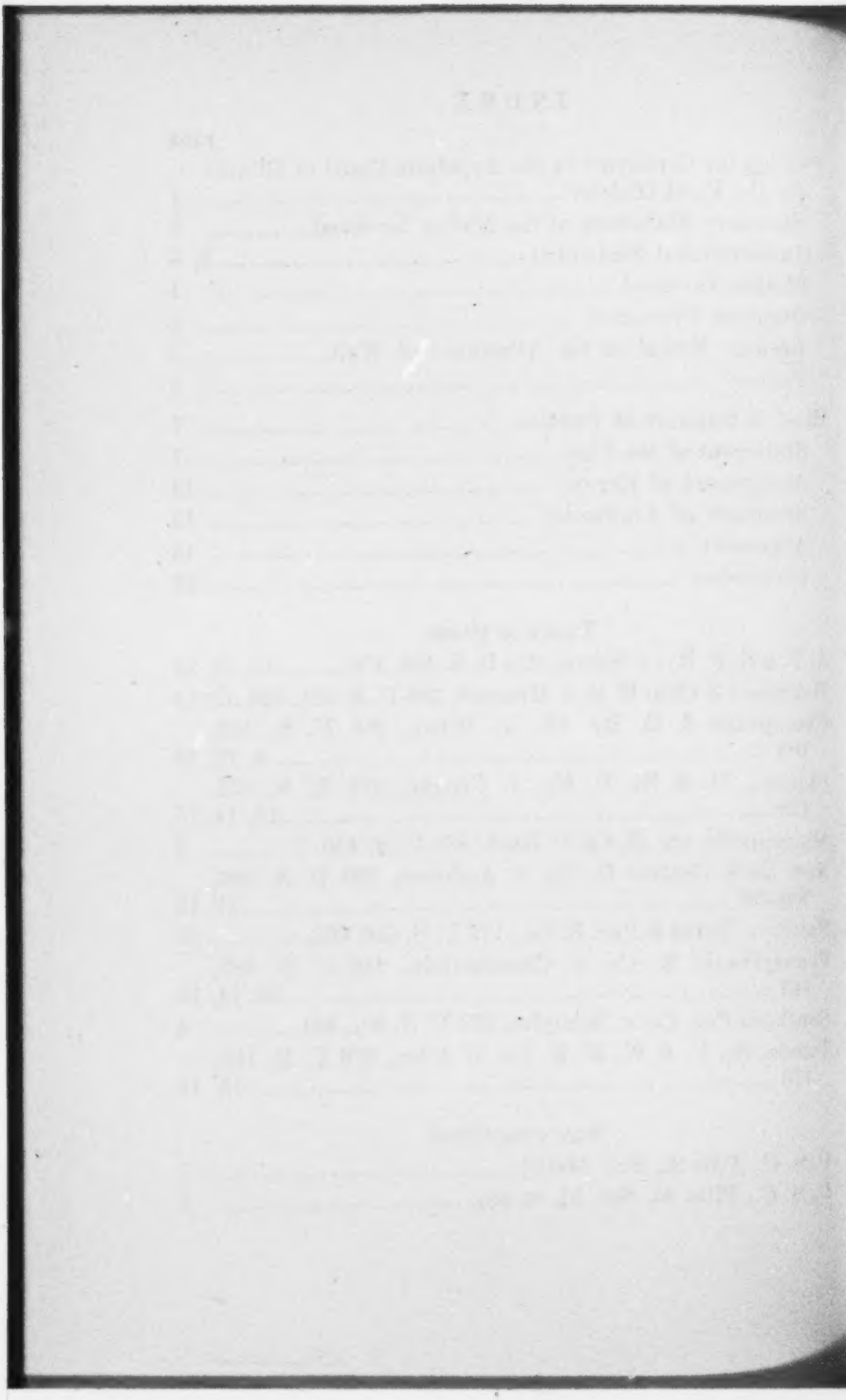

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT, OF THE STATE OF ILLINOIS, AND SUPPORTING BRIEF.

MAY IT PLEASE THE COURT:

Charles M. Thomson, Trustee of Chicago and North Western Railway Company, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a suit based on the Federal Employers' Liability Act, filed and tried in the Superior Court of Cook County, Illinois. Albert E. Sevier, Respondent's intestate, was em-

ployed in interstate transportation by Charles M. Thomson, Trustee of the Chicago and North Western Railway Company. On the night of May 21, 1937, Sevier was working as head-end brakeman on petitioner's freight train. The train stalled (stopped) while going up a hill and the engineer made unsuccessful attempts to get up the hill (R. 14, 15). Sevier, who was riding in the engine cab, went back to make a cut so the train would be in two parts, thus permitting the first section to be taken on up the hill separately (R. 18). At the place where he had decided to make the cut Sevier signaled the engineer with his lantern to slack back so that the cars could be uncoupled (R. 19). During the backing movement Sevier's lantern was seen to disappear (R. 21). The engineer went back to investigate and found Sevier crushed to death between the couplers of the cars where he had made the cut (R. 17). There were no eyewitnesses to the accident. The accident could only have happened, however, by reason of the failure of Sevier to set the brakes on the rear section before signaling the engineer to slack back. As a result of this failure, when he uncoupled the cars the rear section started to move back down the hill (R. 48, 50, 54, 55, 62, 77, 78, 89-91, 94, 96-97, 99, 107, 112-114, 116, 117). To stop it Sevier must have gone between the two sections and applied the brake on the rear car of the rear section, thus suddenly stopping it and while doing this he was caught between the stopped rear section and the backing forward section and crushed to death (R. 16, 17, 26, 27, 29, 48, 50, 54, 55, 72, 77, 78, 89-91, 94, 96, 97, 99, 107).

The case was tried on two different occasions in the Superior Court of Cook County, Illinois. Upon the first trial respondent had a verdict and judgment for $15,000.00. A new trial was granted and the Appellate Court of Illinois, an intermediate court of review, affirmed the order granting the new trial (R. 168). Upon the second trial respondent

had a verdict and judgment for $20,000.00 (R. 9) and petitioner appealed from that judgment. The Appellate Court affirmed the judgment (R. 171). By order of the Appellate Court, its opinion was directed not to be published in full, 314 Ill. App. 382. Within the time permitted by law, petitioner filed a petition for leave to appeal to the Supreme Court of Illinois and that court denied such petition (R. 173), thereby making the judgment of the Appellate Court of Illinois final. This petition for certiorari follows.

JURISDICTIONAL STATEMENT.

1. Plaintiff's cause of action, if any, and defendant's defenses, if any, depend upon the provisions of 35 Stat. 65, Ch. 149 (U.S.C., Tit. 45, Secs. 51 to 59), known as the Federal Employers' Liability Act. The complaint of plaintiff specifically refers to and is based on the Federal Employers' Liability Act (R. 4). Defendant's answer denies liability under this Act (R. 11, 12). The instructions to the jury, verdict, judgment, decision of the Appellate Court affirming the judgment, and denial of leave to appeal by the Supreme Court of Illinois (R. 9, 133-146, 168-171, 173), are all based upon the Federal Employers' Liability Act.

A final judgment has been rendered by the highest court of Illinois in which a decision could be had involving rights, privileges, and immunities specifically set up and claimed by both parties under the Constitution and statute of the United States (35 Stat. 65). This court, therefore, has jurisdiction to review by virtue of Section 344(b) (Judicial Code, Sec. 237, amended), U.S.C.A. 28. The opinion of the Appellate Court appears at pages 168 to 171 of the transcript of record. No opinion was filed by the Supreme Court of Illinois.

2. The date of the decision of the Appellate Court of Illinois sought to be reviewed is April 20, 1942 (R. 168). That is not the date, however, from which the statutory

period of time within which to make application to this court for writ of certiorari is to be computed. That date is September 18, 1942 as appears from the following:

After the rendition of the Appellate Court decision, petitioner herein petitioned the Supreme Court of Illinois for leave to appeal from the Appellate Court decision, but the Supreme Court of Illinois denied the application by order duly entered September 18, 1942 (R. 173).

3. The nature of the case and the rulings below are such as to bring the case within the jurisdictional provisions relied upon.

4. Cases believed to sustain the jurisdiction are *Minneapolis, etc. R. Co.* v. *Rock,* 279 U. S. 410, *Chesapeake & O. R. Co.* v. *Mihas,* 280 U. S. 102, *and Southern Pac. Co.* v. *Schuyler,* 227 U. S. 601, 611.

STATUTE INVOLVED.

The case arises under the Federal Employers' Liability Act (U. S. Code, Title 45, Secs. 51, et seq.).

THE QUESTION PRESENTED.

Is there any evidence in the record legally tending to prove that negligence on the part of petitioner proximately caused or contributed to cause the death of respondent's intestate?

This question was decided by the Appellate Court of Illinois adversely to petitioner. It is our contention that in doing so the Appellate Court (a) failed to familiarize itself with or understand the facts, (b) gave no consideration to the essential facts, (c) gave the ruling Federal court decisions no consideration, and (d) found as facts the imaginative contentions of counsel for respondent.

We contend (1) that there is no evidence in the record legally tending to prove that negligence on the part of the petitioner was the proximate cause of the death of respondent's intestate, and (2) that the conduct of respondent's intestate in failing to set the brakes on the rear section before uncoupling the cars was the sole, primary and efficient cause of his death.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The Appellate Court of Illinois has decided Federal questions of substance in conflict with the applicable decisions of this Court, to-wit:

A. In allowing respondent to recover where there was no negligence shown on the part of petitioner.

B. In allowing respondent to recover where the conduct of respondent's intestate was the sole cause of his death.

The instant case comes plainly within the purview of the following rule of this Court, as to what reasons will be considered for granting a writ of certiorari: Rule 38 5(a), "Where a state court has decided a federal question * * * in a way probably not in accord with applicable decisions of this court."

PRAYER.

WHEREFORE, Petitioner prays that a writ of certiorari be issued by this Court, directed to the Appellate Court of Illinois, First District, commanding that court to certify and send to this Court a transcript of the record in the case entitled "Mary B. Sevier, Administratrix of the Estate of Albert E. Sevier, deceased, Appellee, v. Charles M.

Thomson, Trustee of the Chicago and North Western Rail way Company, Appellant, number 41808," including also the proceedings in said Appellate Court, together with the Illinois Supreme Court's denial of petitioner's request for leave to appeal, to the end that said cause may be reviewed and determined by this Court and the judgment of the lower court be reversed.

WILLIAM T. FARICY,
NELSON J. WILCOX,
Counsel for Petitioner.

DRENNAN J. SLATER,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Appellate Court of Illinois in this case has not been reported. No opinion was rendered by the Supreme Court of Illinois in denying petitioner's request for leave to appeal.

The jurisdictional grounds upon which review of this case is sought are set forth on pages 3 and 4 of the foregoing petition and are herein incorporated by reference.

STATEMENT OF THE CASE.

The facts, all of which were wholly uncontradicted, are as follows:

On May 21, 1937, petitioner's southbound freight train, consisting of 86 cars, an engine and a caboose, became "stalled" while going up a long hill located about 2 miles north of Buda, on petitioner's Southern Illinois Division (R. 14, 15). The crew operating the train consisted of a conductor, head or front-end brakeman, a rear brakeman, an engineer, and a fireman (R. 14). The train was on its regular daily run. The accident happened between 9 and 10 o'clock of a dark night and in the open country. It is not uncommon for a long freight train to stall on a long hill, and every experienced trainman (and all of this crew were such) knows when it is about to happen (by the slowing up of the train against the power of the engine) and knows what has to be done about it.

The head-end brakeman (who rides in the engine between stations) gets off and goes back, or stands beside the train until the final stall, and then he takes charge of the matter (R. 51, 52).

The train must be "cut" in two, and the front part or section taken to the next place on the line where there is a sidetrack, and left there; the engine then goes back,

couples onto the rear section, hauls it to such sidetrack, and the two sections are there rejoined and the train proceeds on its way. The whole operation is called "doubling the hill" (R. 47).

There is only one proper way of performing the "cutting" part of the "doubling" (R. 53, 93). It consists of five things or steps successively, after the head brakeman selects the place (between which two of the cars) to make the cut. First, he closes the air brake angle cocks on the two cars, the one at the rear end of what will be the rear car of the front section after the cut is made and the other at the head end of what will be the head or first car of the rear section after the cut is made. Second, he uncouples the air hose between the two cars to be separated. Third, he reopens the angle cock at the head of the rear section, doing which automatically sets the brakes on each car and the caboose of that section, the effect of which is to anchor the section there until the engine, after depositing the front section of the train on the said sidetrack, comes back to get the rear section. Fourth, he steps out from between the cars, on the engineer's side, and signals the engineer to slack back, or push back, the cars ahead of the cut, so that he can "pull the pin" which means lifting the locking block of the car couplers, by means of the pinlifting lever, which extends from the coupler to the outside of or beyond the car. The pin cannot be pulled when the train is stretched out and taut. Fifth, when the slack gets back to the place of the cut, releasing the tension on the locking block, he "pulls the pin," as above described, whereupon the "cutting" is completed, he then signals the engineer to go ahead, and then the rest of the "doubling" is performed as indicated (R. 53, 93, 112). The pin cannot be pulled or the cars uncoupled until the slack gets back to the couplers where the cut is made (R. 97). The "slack" is the longitudinal play between the cars,

amounting to 10 to 12 inches between each pair of cars (R. 126).

That backward movement is not a movement of the whole train, but only of the cars ahead of the cut. When it reaches the place of the cut it is stopped by the rear section—if, as they should be, the brakes have been set on the rear section before the cars are uncoupled. Such a slack-back movement does not move the rear cars or the caboose.

As the slowing of the train, at the time in question, indicated that it was about to stall Sevier got out of the engine to inspect the cars back to the place he should select to make the cut. At once when the train did stop, the engineer reversed his engine, backed up a short distance, then put his engine in forward motion, in an attempt to overcome whatever was the difficulty, but was unsuccessful, the train, on the attempt, moving farther ahead but a short distance and then again stalling. Thereupon the engineer, by use of the engine brake, held the train standing, "stretched out or taut," for three to five minutes, watching for a signal from Sevier to slackback (take the tension off the couplers so that they could be uncoupled), got the expected signal, slacked back until stopped without his volition, watched for a further signal from Sevier. Just before the slackback movement was stopped Sevier's lantern disappeared and the engineer, after waiting for about five minutes went back to see what was the matter. Sevier was found crushed between the couplers of the 36th and 37th cars back of the engine, the place he had selected for making the cut.

In making the cut Sevier had taken all of the necessary steps in their proper order, except one. He did *not* set the brakes on the rear section before he signaled the engineer to slack back, and so, when the slack got back to the place of the cut, and he uncoupled the cars ("pulled the

pin''), the rear section naturally started down the hill (R. 48, 50, 54, 55, 62, 77, 78, 89, 90, 91, 94, 96-7, 99, 107, 112, 113, 114, 116-17).

When Sevier signaled the engineer, and thereafter uncoupled the cars and the rear section started down the hill he was outside of the cars, in a place of perfect safety (R. 53, 54, 93, 96, 97, 112-13). In order then to stop the rear section and prevent it running away, he went between the couplers of the then separated sections and set the brakes on the rear section, by opening and then closing the angle cock on the head car of that section, which angle cock was on the side of the couplers away from him, on the opposite side of the train (R. 55, 96-7, 113), and in getting to it to open it he put his body between the then separated car couplers. This he did, beyond any doubt, for after the rear section started down hill it was suddenly stopped by the setting of its brakes in emergency, which effect could only have been produced by Sevier himself, and only by his opening and again closing the air brake angle cock on the front car of that section, which was beyond the couplers on the side of the train opposite where he was when he pulled the pin (R. 16, 17, 26, 27, 29, 48, 50, 54, 55, 72, 77, 78, 89, 90, 91, 94, 96-7, 99, 107).

The air brake system on such a train as this is commonly controlled by the engineer, but where, as here, circumstances require it, control can be taken away from him by any trainman at any space between any two of the cars in the train, by closing the angle cock (there being one such on each end of each car) on the side of such space which is nearest the engine. When this is done the engineer cannot set the brakes on the cars back of that closed angle cock (R. 17, 77, 93-4, 97).

There is an independent air brake on the engine, not a part of the automatic train-line air brakes, the operation of which is confined to the engine itself (R. 111).

The "automatic air" or train-line air brakes system consists, from engine to caboose, inclusive, of a single complete air duct or air line. The part of the air line from end to end of each car is under the car and consists of a metal pipe. As the part of the air line between the cars must be flexible, there is attached to each end of such pipe an elastic hose which is capable of being clasped or coupled to any other like air hose on any other car. At the place where the air hose is joined to or with the air pipe is a valve or cock, operable by a lever outside of and atop the end of the car pipe called an "angle cock."

If a train pulls or breaks apart, without the angle cocks being closed at the point of the break, it unclasps or pulls apart the air hose at that place and that sets the brakes on every car in the train, the action moving rapidly in each direction from the point of the break. On the other hand, when a trainman is making a "cut" of the train, he has complete control of the air brakes, in both directions from the place of the cut. If he closes and then opens the angle cock nearest (from that point) to the engine the brakes on each car from there to the engine set immediately, taking control away from the engineer. If he closes and then opens, or opens and then again closes, the angle cock farthest from the engine the brakes on each car from there to the rear end of the train set immediately, leaving the engineer in control of the braking power on only the cars between the engine and the man at the angle cocks.

In other words the man making the cut (Sevier here) has complete control of the automatic braking system of the train, except that after once setting the brakes *he* cannot unset or release them (R. 112). If on a hill and he cuts the train in two before first setting the brakes on the rear section, and that section then starts to "run away," he of course should immediaely stop the backward movement of the *front* section by opening the angle cock at the

rear end of that section, the lever of which is on his side of the train, right under his hand. If he does so he may then catch the rear section and set the brakes on it without danger of getting caught between the couplers. On the other hand, if, in those circumstances, he does not stop the backward movement of the front section, but goes between the couplers to get to the opposite angle cock and set the rear section brakes he puts himself in position to be caught between the car couplers when the rear section stops and the front section catches up with it.

When the cutting is properly performed, and the brakes set on the rear section before the pin is pulled, the backing up movement of the forward section is stopped when the slack gets back to the place of the cut; *at no time is it possible for the brakeman to get between or to be injured by the car couplers* (R. 53, 54, 72, 97, 112-113).

The three "trainmen," in this case Keohane, Williams and Sevier, had had years of service together and on numerous occasions each had taken part, when acting as head brakeman in cutting stalled trains and doubling them over hills (R. 14, 28, 45, 51-2, 89, 91, 98), and Lukeman, the engineer, had worked with Sevier and the others for many years (R. 19, 23, 62, 93, 103).

ASSIGNMENT OF ERRORS.

The Appellate Court of Illinois erred:

In affirming the judgment of the Superior Court of Cook County.

In finding that negligence on the part of petitioner was the proximate cause of the death of respondent's intestate.

In failing to find that negligence of respondent's intestate was the sole, primary and efficient cause of his death.

SUMMARY OF ARGUMENT.

There was no evidence upon which the jury could properly find a verdict for respondent, and petitioner's motion for a directed verdict should have been granted.

Chicago, M. & St. P. Ry. v. *Coogan,* 271 U. S. 472;
Baltimore & O. R. R. v. *Groeger,* 266 U. S. 521;
Pennsylvania R. Co. v. *Chamberlain,* 288 U. S. 333;
New York Central R. Co. v. *Ambrose,* 280 U. S. 486;
Patton v. *Texas & Pac. R. Co.,* 179 U. S. 658;
A. T. & S. F. Ry. v. *Saxon,* 284 U. S. 458;
Chesapeake & O. Ry. Co. v. *Mihas,* 280 U. S. 102;
Toledo & St. L. & W. Ry. Co. v. *Allen,* 276 U. S. 165.

ARGUMENT.

In suits under the Federal Employers' Liability Act, if the claim is made that there is no evidence or not sufficient evidence to sustain a finding that negligence on defendant's part caused or contributed to cause the injury or death involved (*C. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, bottom of p. 473) this court "*will examine the record,* and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed" (*Ibid,* middle of p. 474).

That is the claim we make. The prayer of the petitioner is that this court exercise that jurisdiction in this case and "*examine the record.*" In which event the record will conclusively demonstrate to this court that "the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death," and that the judgment should be reversed.

The following propositions of law also are well settled by this court:

(a) Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. *C. M. & St. P.* v. *Coogan*, 271 U. S. 472, middle of p. 477.

(b) If under the evidence a finding of no negligence is *as* consistent (or certainly if more so) as a finding of negligence, no jury question is presented, and it is the duty of the trial judge to direct the verdict. *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 524; *C. M. & St. P.* v. *Coogan*, 271 U. S. 472, 478; *Penna R. Co.* v. *Chamberlain*, 288 U. S. 333, 341.

(c) If the record leaves the matter in the realm of speculation and conjecture plaintiff cannot recover. *C. M. & St. P.* v. *Coogan*, 272 U. S. 472, 478, and cases cited at bottom of p. 478.

That the decision of the Appellate Court is contrary to each of these three rules of law is obvious, both from the record and from the opinion itself. If, for instance, as to the first of them we assume that there *was* circumstantial evidence relied upon to prove that Sevier pulled the pin during the first backward movement after the train first stalled, there is an utter failure to prove the circumstance. The proof is all to the contrary. *What happened after that first backward movement could not have happened if the pin had been pulled during it.*

As to the second and third of those rules it undeniably is as consistent—nay, much more so—under the evidence, that this death was caused without negligence on the part of the petitioner as that negligence of the engineer was its proximate cause. Nothing could be more certain than that a finding in accordance with the statement of facts by the court below would have no other basis than imagination; at the most, speculation, conjecture and guess.

In *New York Central R. Co.* v. *Ambrose,* 280 U. S. 486, 489-90, the court said:

> "In any view of the matter, the respondent (plaintiff), upon whom lay the burden, completely failed to prove that the accident was proximately due to the negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and can not be allowed to stand. *C. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 478, and cases cited.
>
> "The utmost that can be said is, that the accident *may* have resulted from any one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough. See *Patton* v. *Texas & Pacific R. Co.,* 179 U. S. 658, where, at page 663, this court said:
>
> " 'The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence * * * it is not sufficient for the employe to show that the employer *may* have been guilty of negligence —the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.' "

In *Penna R. Co.* v. *Chamberlain,* 288 U. S. 333, at p. 340, this court said:

> "There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to re-

> cover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong."

In *Atchison, etc. Ry.* v. *Saxon,* 284 U. S. 458, at p. 459, in denying recovery under the Federal Employers' Liability Act this court said:

> "Nobody saw the accident; no one can say with fair certainty how it occurred. Consistently with the facts disclosed, it might have happened in one of several ways and without causal negligence by the petitioner. * * * What occasioned this distressing accident can only be surmised. It was necessary to show causal negligence in order to establish the respondent's right to recover. The evidence fails to meet this requirement."

To support the burden of proving that negligence on the part of petitioner was the proximate cause of her intestate's death, respondent (a) read into the record pre-trial depositions of the conductor, the engineer and the rear brakeman of the train in question, and (b) introduced in evidence a number of rules found in petitioner's book of rules. When she rested her case there was no evidence in the record as to the cause of the death.

Even if conceded that every company rule introduced was violated, no causal connection between such violations and the death was shown. The Appellate Court adopted respondent's contention that petitioner should be held liable because of an alleged violation of petitioner's Rule 14 requiring that a signal to back up, given from the rear

of a train, be acknowledged by the engineer with three short whistles. In this connection it must be noted that there was no showing in the record that *any* whistle signals were required where the movement was nothing more than slacking back the front portion of the train. On the contrary, petitioner made an offer of proof to show that on a slack-back movement it is not usual or customary for any whistle signal to be given, and that there is no rule or other requirement that such a signal be given (R. 57).

Moreover, as a matter of law there is no duty upon the part of the employer to "warn" his employee of something he knows all about. Failure to warn in such a situation is not actionable negligence. Even if, in this case, a company rule required the blowing of a whistle in response to Sevier's slack back signal, blowing it would have given Sevier no information he did not already have. He needed no "warning," and the failure to whistle had no causal connection with the injury.

The only possible meaning of the whistle would be that the engineer was about to do what Sevier had signaled him to do. Such advice to Sevier would be perfectly pointless because the train was stretched taut and Sevier could not uncouple the cars until the slack got back to him; until he uncoupled the cars it was physically impossible for him to get between the car couplers; he was outside the line of the cars when he gave the signal, as well as when the slack got back to where he was making the cut, and also when he uncoupled the cars. It was only after that that he *could* get between the couplers. Certainly there was no causal connection between the failure to whistle and Sevier's going between the cars to repair his failure to anchor the rear section.

Precisely the same thing would have happened if the engineer had given the whistle response; Sevier would

have stood safely outside the cars (as he did) until the slack got back to where he was (as it did), whereupon he would have pulled the pin and uncoupled the cars (as he did) and then, because he had failed to set the brakes on the rear section, that section would have started back down the hill (as it did) and he then would have gone between the couplers (as he did) to set the brakes on and stop the rear section (which he did).

In *C. & O. R. Co.* v. *Mihas*, 280 U. S. 102, 108, the court said:

> "There is nothing in the record to show that employees engaged in the switching operation knew or had reason to believe that Mihas was in any position of danger. In the absence of such knowledge or ground for belief, they were not required to warn him of the impending switching operation or to take other steps to protect him."

In *Toledo, St. Louis & Western R. R. Co.* v. *Allen*, 276 U. S. 165, 173, the court said:

> "There is nothing to sustain a finding that plaintiff was in any danger other than such as was usually incident to his employment or that any member of the crew knew or had any reason to believe that he was oblivious of the situation. *Illinois Central R. R. Co.* v. *Ackerman*, 144 Fed. 959, 962. In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard or to warn or to take other steps to protect him."

The Appellate Court's opinion indicates that, while Sevier's back was turned the front section sneaked up on him. This was, of course, utterly impossible, as the slacking back made 36 separate and noisy bumps before the

slack reached the cut. Sevier could not have been unaware of it. Nor was his back turned. There is no such evidence in the case. His light was outside the cars all during the slacking back (R. 81). He could not have uncoupled the cars until the slack got back to where he was, and he *did* uncouple them, so ***must*** have been aware that the slack had come back.

The Appellate Court decision is also based on the theory, with regard to the two backward movements that after the first movement Sevier pulled the pin and uncoupled the cars; that he then signaled the engineer with his lantern that *"the train has parted;"* that thereafter without warning the engineer backed up instead of going ahead to the next siding. In other words that the engineer should have acted upon a "train has parted" signal in the same way as upon a "go ahead" signal.

As is obvious, the position so taken by the court is based upon a complete misunderstanding of the facts. The signal "train has parted" means that there has been an accident, that the train has "pulled apart" or "broken in two," without intention, the effect of which is to automatically set the brakes on every car in the train (R. 45, 60, 77, 111, 114, 119). No such thing had here occurred. No witness testified that Sevier pulled the pin (uncoupled the cars) on the first backward movement of the train. The evidence and every permissible inference from the evidence are to the contrary. *He did not pull the pin at that time.* He could not have done so without creating a condition which did not exist. If he had done so, what did happen could not have happened. It would have been physically impossible for it to happen.

If Sevier pulled the pin during the first backward movement he violated all of the rules and customs applying to a "doubling" operation.

If he had then pulled the pin the rear section would have started down hill and then when the engine was put in forward motion the front section would have gone on, instead of stalling or coming to a stop.

As to that first backward movement and the second stall the engineer was corroborated by both the conductor and the rear brakeman, both of whom were then in the caboose (R. 44) at the rear end of the train (R. 14, bottom; R. 15, last four lines; R. 16, first four lines; R. 44, R. 89 near bottom). There is no evidence or inference to the contrary.

If the train had "parted" the brakes on the rear section would have automatically set (R. 119) and could not be released at the point of the break (R. 112). A trainman can *set* the brakes from between any two cars in a train, but cannot thereafter release them (R. 112).

Assume Sevier pulled the pin on the first backward movement. It follows that when he did so the slack was "in," i. e., all of the longitudinal play between the cars was then closed together, with no openings anywhere between the car couplers. Then assume that he gave some (any) kind of a signal to the engineer, whereupon the latter either continued the backward motion, or, if it had been stopped, started another. What then? Either (a) there would not (could not) have been any opening or space between the couplers for Sevier to *get* in, or (b) there was no forward movement or a second stop or stall, or (c) there was no backward and then forward motion of the rear end of the train, such as was testified to by the engineer, the conductor and the rear brakeman. It is undisputed that that backward movement was but part of an attempt by the engineer to get the whole train started and "make" the hill without "doubling," that the effort was unsuccessful, and that the following forward movement resulted in gaining only a few feet, when the whole train again stalled (R. 125, 15,

last two lines, 16, top four lines; 18-19, 20, 26, 28, 44-5, 68-9) "stretched out and taut", in which position it was held for several minutes (R. 125) by the independent engine brake, until Sevier gave the slack-back signal to the engineer. If the pin had been pulled on the first backward movement it would have completed the "cut," and the next forward movement would have been that of the front section only, which *could not have stalled,* but would have gone on its way, as it did after this accident had happened (R. 91, bottom). That the rear section did, at some time, start down hill is not denied. If that did not happen until after Sevier's signal had been given and the engineer had backed the front section against the rear section, then the accident had happened before the rear section started back, which is utterly impossible, for it is undisputed that after the rear section started back and had gone a distance of about half a car length its automatic brakes were applied, which could not have been brought about by anybody except a *still alive* Sevier (R. 48-9, 50, 55, 77, 78).

The engineer *knew* that Sevier would be in a place of complete safety until the front section was stopped by bumping into the anchored rear section. There is no possible way in which he could have become advised of any danger to Sevier. He was operating on signals from Sevier. He would continue in honoring one until he received another, or at least until there was some indication that he should not. There was nothing abnormal or out of the usual course until Sevier's lantern had *stayed* "disappeared" for several minutes, without being used to give the next expected signal. *Then*, and not until then, was there anything to cause the engineer to suspect that all was not as it should be.

CONCLUSION.

We respectfully submit that as stated in *Atchison, etc. Ry.* v. *Saxon,* 284 U. S. 458, 459, this case is "one of a peculiar class where this court has frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted." In order that justice may be done in this case, we submit that a writ of certiorari should be granted and this court should review the decision of the Appellate Court of Illinois, First District, and finally reverse it.

WILLIAM T. FARICY,
NELSON J. WILCOX,
Counsel for Petitioner.

BRENNAN J. SLATER,
Of Counsel.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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DEC 29 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 573

CHARLES M. THOMSON, TRUSTEE OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY (SUBSTITUTED FOR CHARLES P. MEGAN, TRUSTEE),

Petitioner,

vs.

MARY B. SEVIER, ADMINISTRATRIX OF THE ESTATE OF ALBERT E. SEVIER, DECEASED,

Respondent.

ANSWER OF RESPONDENT AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

JOHN J. YOWELL,
69 West Washington Street,
Chicago, Illinois,
Counsel for Respondent.

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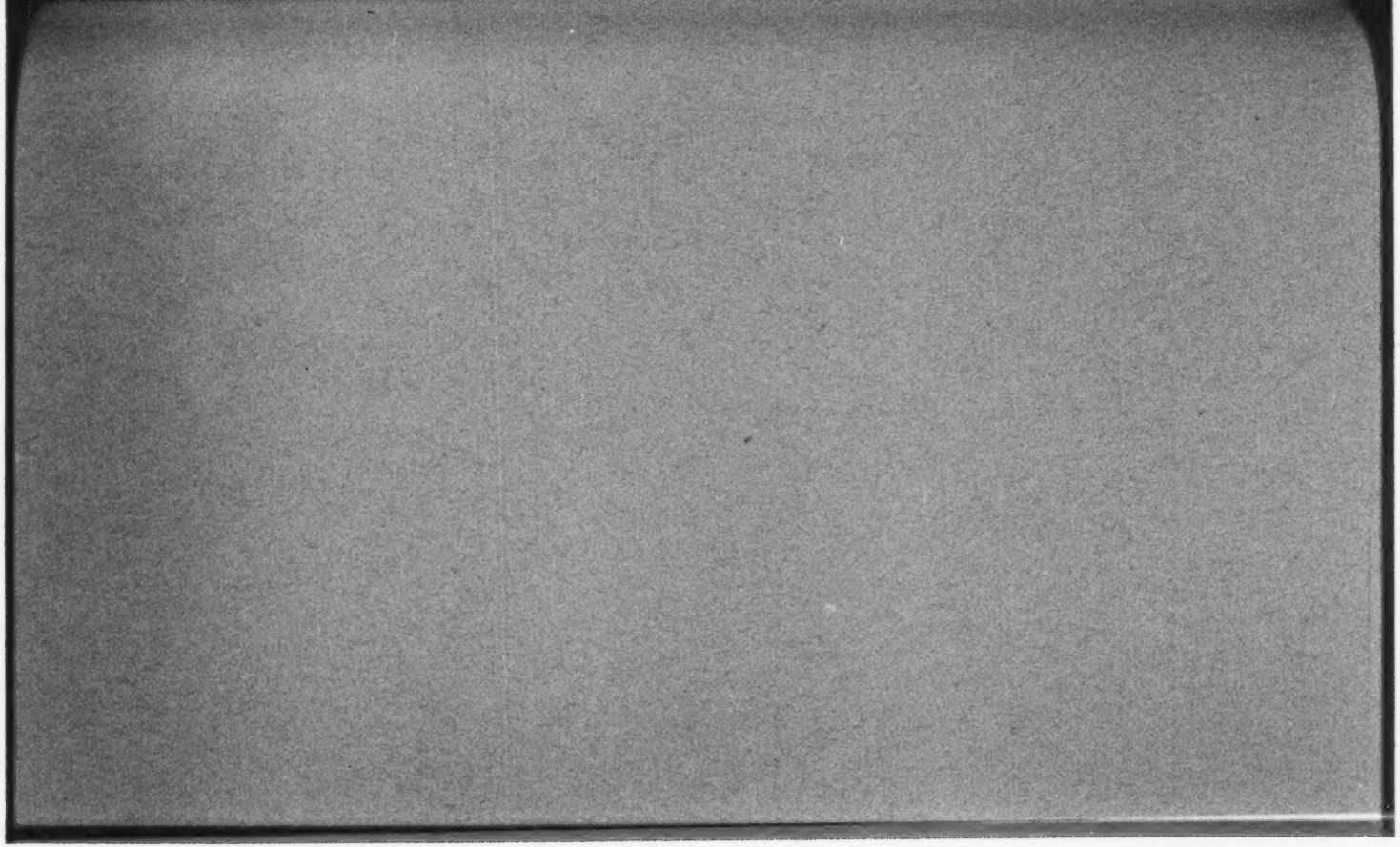

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STATEMENT OF FACTS.

This additional statement of facts is made to supply omissions and to cure inaccuracies in the statement of facts contained in the petition.

Attention is here called to the fact that there is not appended to the petition the opinion of the Appellate Court of Illinois to which the writ is sought, as required by Paragraph 1 of Rule 12 and Paragraph 2 of Rule 38, but

the opinion is inserted in the abstract. For convenience that opinion is set forth in an appendix to this answer.

No constitutional right, privilege or immunity was pleaded or involved in this case. No question was presented to or passed upon by the State Court with respect to the construction or to the applicability of any Federal statute. The applicability of the Federal Employers Liability Act was conceded. Its construction was not in dispute. The Appellate Court of Illinois for the First District, being a court of appellate jurisdiction, made no findings of fact. In affirming the judgment of the trial court based on the verdict it held that the case was one for the jury. The court said:

> "Certainly all reasonable men would not agree that the accident was caused solely by the negligence of Sevier and that there was no negligence on the part of the engineer of the train."

The Supreme Court of Illinois decided no question of law or of fact but in the exercise of its discretion denied petitioner leave to appeal.

Pertinent facts omitted from the petition for certiorari include the following:

1. The train was made up of 86 empty cars (Abst. 14, 44). It was around a pronounced curve (Abst. 156), on a grade of approximately 1% or 1 foot per one hundred feet (Abst. 36). The engine was supposed to pull 86 cars over this grade (Abst. 68). The conductor had seen trains of 145 cars go over the grade (Abst. 67). The conductor in charge of the train did not know what caused it to stall (Abst. 68). Various things can cause a train to stall, including the sticking of brakes (Abst. 82) which are held from the surface of the wheels the distance of approximately two or three thicknesses of newspaper

(Abst. 65). As the train began to slow down, obviously about to stall, the deceased inquired of the engineer whether he had better drop off and look the train over and the engineer assented (Abst. 18). The deceased thereupon got off the engine cab on the left or fireman's side while the train was still in motion (Abst. 23). After the train had proceeded about twenty car lengths it stalled (Abst. 23).

The deceased did not get out of the engine cab to cut the train or to perform a doubling operation (Abst. 22) and he had no understanding with the engineer regarding the cutting of the train, but the reason he got out was to make an inspection (Abst. 22, 82).

An inspection would require not less than ten minutes (Abst. 73). If the deceased discovered that the brakes were sticking he could remedy this situation on the spot, permitting the train to proceed on its way (Abst. 68). It was his duty on completion of his inspection to report to the conductor (Abst. 73), whose responsibility it was to determine at once, if he could, what caused the train to stall (Abst. 68).

Before the deceased could have completed the inspection of the train and within a few minutes after he got out (Abst. 83) the engineer without knowing where the deceased was, without receiving any signal, and without giving any warning, backed his engine to bunch the slack in the train (Abst. 18-23). There was an application of the automatic brakes throughout the length of the train (Abst. 16, 19, 20) and the engineer attempted unsuccessfully to go forward.

During this operation and while the tension of the draw bars was released and the cars bunched a cut could be made—that is, the train could be uncoupled and parted or separated into two sections (Abst. 23).

Sometimes trains part on grades without being uncoupled by anyone (Abst. 119-123) especially when around a curve (Abst. 71, 119) and also when an engine is backed and then suddenly reversed (Abst. 119). When this happens the pulling apart of the air hose between the cars that are thus parted releases air and sets the brakes on both of the separated sections. That is the purpose of the automatic air brake system (Abst. 119) which, operated by air pressure, keeps the brakes free or released from contact with the wheels when the air pressure is sufficient; and reduction of the air pressure causes an application of the brakes (Abst. 111). The brakes would not set instantaneously throughout the length of each section but would require an interval of some seconds (Abst. 120, 122). On this movement the engineer testified that he did go forward a few feet (Abst. 20). At some time after the train stalled the rear section of the train was observed to move back and stop by the application of the automatic air brakes (Abst. 26, 89). The defendant's rear brakeman testified that while he was walking alongside the train, the cars near him moved back and stopped "as though the engineer were attempting to start the train" (Abst. 89).

2. Defendant's engineer testified that after he made his attempt to start the train he looked back on his side of the train and saw a light. He stated he received a back-up signal (Abst. 19, 20, 22) and that a back-up signal is a signal at arm's length (Abst. 19). Defendant's signal describing a circle with the lantern held at arm's length, according to its rule 12e is not a signal to back up but is a signal that the train has parted (Abst. 157). The signal to back up is a circle at half-arm's length (Abst. 157). The only difference in the two signals is in the size of the circle (Abst. 60).

The engineer thereupon backed again without giving any signal either of warning or acknowledgment (Abst.

24), and without any application of brakes, for a distance of some twenty to sixty feet (Abst. 21) until he ran into the rear fifty cars of the train on which the automatic brakes had been set (Abst. 27) crushing Sevier to death between the couplings of the 36th and 37th cars of the train (Abst. 24, 25).

The body of the deceased was held in an erect position facing toward the rear of the train and toward the left (Abst. 103). His feet were five or six inches above the ground (Abst. 104). Neither coupler was open (Abst. 104). The angle cock on the front end of the car on the rear section was to the right of the coupler as on all freight cars (Abst. 99, 102) and to the right of deceased (Abst. 103). The deceased was left-handed (Abst. 23). Both angle cocks had been closed (Abst. 27).

3. The engineer testified that his purpose in backing was to "take the strain off the draw bars" (Abst. 20); that the cars would not move unless pushed by the application of steam (Abst. 20) and that slack between the cars was taken up by working steam against the "natural brake of the train" (Abst. 84). As he expressed it: "I had to overcome it with steam pressure because these were heavy cars and the train was partially around the curve so that if we did not have any cars coupled at all, so long as I continued to apply steam I continued to push them together" (Abst. 84). The rear fifty cars of the train were around a pronounced curve (Plaintiff's Exhibit B, Tr. 152). The effect of this was friction of the flanges of the wheels against the outer rail so that the cars around this curve did not run as freely as those on straight track (Abst. 70, 71, 130, 131). The engine and first forty cars were on straight track (Abst. 15). On the second backing movement by the engineer, which killed the deceased, the engineer backed by the application of steam, did not apply any brakes (Abst. 22) and came to a stop only because he

ran into the rear section (Abst. 21) and not by the application of any brakes (Abst. 22, 25). While he was backing he saw the light disappear (Abst. 25) but he made no effort at any time on this movement to apply any brakes (Abst. 25). He could have fully applied the brakes on the last one of the 36 cars back of the engine in about two and a half seconds (Abst. 122).

Defendant's rule 14 required that a signal to back be acknowledged by the engineer with three short whistle sounds (Plaintiff's Exhibit E, Tr. 163).

4. Men making couplings and making uncouplings go between the cars to separate the air hose and to manipulate the angle cocks (Abst. 120). The width of a freight car is at least 10 feet and the distance of the angle cock to the center line of the coupling ranges from 7 to 13 inches from the face of the coupling which is on the center line of the car (Abst. 120). It is necessary to get in between the cars to turn the angle cock (Abst. 120, 121).

If a brakeman were on the fireman's side of the train and intended to make a cut of the train he would, before getting on the engineer's side, close the angle cock on the fireman's side. After getting on the engineer's side he would uncouple the air hose and then set the brakes on the rear section by reaching over the couplers and opening the angle cock at the front end of the rear section (Abst. 107, 108). He would have quite a time reaching over them. His body would have to move along with his hand (Abst. 121).

SUMMARY OF ARGUMENT.

A. The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, and only when it follows therefrom that as a matter of law no recovery can be had upon any view which can properly be taken of the facts the evidence tends to establish.

Gardner v. *Michigan Central R. R. Co.*, 150 U. S. 349, 361;

Illinois Central Railroad Co. v. *Skaggs*, 240 U. S. 66, 69;

Union Pacific v. *Huxoll*, 245 U. S. 535.

B. The question of negligence in this case was for the jury.

1. All reasonable men would not conclude from the evidence in this case that while the engine was taking up slack (bunching or pushing the cars together by backing with the application of steam power against the "natural brake" of the cars on a 1% grade), the train was separated or parted into two sections and the rear section of fifty cars partly around a curve accelerated faster than the engine pushing the front section on straight track.

2. Every reasonable man would not have to believe from the evidence that the deceased, an experienced and careful brakeman, a married man with a large family, who was in good health and making a good salary, would and did run directly in front of the section being pushed back by the engine and between the couplers of moving cars.

3. Not every reasonable man must conclude from the evidence that the deceased ran along between two moving sections in a gap between them, also moving, opened the angle cock on the first car of the rear section, then closed it after allowing the escape of enough air to reduce the pressure twenty pounds in this fifty-car section (Abst. 16), then remained between the moving couplers (so that his body was caught facing the rear section, the angle cock being on the right side of the coupler and to his right—he being left-handed); and that all of these things occurred, although the rear section of the train moved only twenty feet.

4. All reasonable men might not conclude from the evidence that in the mind of the deceased was the certain knowledge that the engineer, more than 500 yards away in the dark, was (a) looking back, (b) observing, (c) correctly interpreting the "signal," (d) understanding that the deceased was giving a signal to "slack back," (e) that the deceased in some way knew that they were going to "double into Buda," and (f) that no acknowledgment of the signal was necessary, and that deceased therefore "assumed the risk" notwithstanding that (1) no member of the crew on this train of empty cars knew what caused it to stall; (2) the deceased went to find out what caused it to stall; (3) various different things could have been the cause, some of which could have been remedied by the deceased; and (4) sufficient time had not elapsed for the deceased to inspect the train and report to the conductor.

5. Some reasonable men might conclude that the defendant's rule that engineers must sound a warning before backing required such warning and even that in the absence of such rule reasonable care required it; it was a dark night, the train extended for over half a mile and the engineer knew that three members of the crew were somewhere on, under, or between the cars, being required to climb

from one side to the other, one of them, the deceased, having got out on the opposite side of the train for the express purpose of making an inspection.

6. It is suggested that reasonable men might reasonably accept the statement of the engineer that "these were heavy cars and the train was partially around the curve so that if we did not have any cars coupled at all as long as I continued to apply steam I continued to push them together," and that therefore the rear section could not have jumped ahead of the front section as the petitioner conjectures must have happened.

If the train could not and did not part during this second backward movement of the engine then it must have done so prior to this movement because at some time the two sections must have been far enough apart for the deceased to be between them. It is more rational to conclude that the two sections of the train separated or parted when the engineer backed the first time. This would have been possible, as stated by the Appellate Court. It was stated by the defendant's engineer that "at that time it would have been possible to cut the cars at any place after I had released that tension" (Abst. 23).

C. Accepting as true the evidence in favor of the respondent with such reasonable favorable inferences as may be drawn therefrom, reasonable men might reasonably conclude that there was negligence on the part of petitioner which contributed to the death of the deceased:

1. That the immediate, direct and proximate cause of the death of the deceased was the backward movement of petitioner's engine and the cars attached to it.

2. That such movement was made by petitioner's engineer.

3. That such movement was made without warning and in violation of petitioner's rule requiring the giving of a warning before backing an engine.

4. That ordinary care required the giving of a warning before setting in motion a long freight train on a dark night knowing that employees, including deceased, in the performance of their duties were or might be in positions of danger.

5. That petitioner's engineer backed farther than was necessary if his purpose was to take up the slack or relieve the tension in the draw bars.

6. That if petitioner's engineer had backed only the distance necessary to take up the slack to the thirty-sixth car and had then applied the automatic brakes and held the slack the deceased would not have been killed; that the testimony of petitioner's engineer respecting the signal he claimed to have received was evasive; that this witness was deeply interested in proving that the responsibility for the death of a fellow employee did not lie at his door and that his testimony, under such inducement for the purpose of showing that he received a signal justifying his action, was not necessarily true and, because of its peculiarly evasive character and other circumstances, was probably not true; that confirmation of this conclusion could be had from observation of the demeanor of this witness on the witness stand.

CONCLUSION.

It cannot be said that the State Court has decided a Federal question of substance not theretofore determined by this court. Nor can it be said that the State Court has decided a Federal question of substance in a way probably not in accordance with applicable decisions of this court.

Petitioner had a fair trial; the cause was properly submitted to the jury and no error was committed requiring a reversal of the judgment. The Appellate Court of Illinois for the First District did not err when it concluded:

> "The decisive questions presented relate to the facts, and as two juries in this case have found for the plaintiff and the verdict is reasonably consistent with the evidence, we would not be justified in reversing for a third trial."

The respondent therefore respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN J. YOWELL,
Counsel for Respondent.
69 West Washington Street,
Chicago, Illinois.

Certificate of Counsel.

I certify that I have personal knowledge of this litigation; that I have examined the foregoing Answer of Respondent and Brief in Opposition to Petition for Certiorari which was prepared personally by me, and that the statements of fact therein are true.

JOHN J. YOWELL.

APPENDIX.

OPINION OF APPELLATE COURT.

(See certified copy.)

AT A TERM OF THE APPELLATE COURT, Begun and held at Chicago, on Tuesday, the Seventh day of April in the year of our Lord One Thousand Nine Hundred and Forty-Two within and for the First District of the State of Illinois.

Present:

Hon. William H. McSurely, Presiding Justice; Hon. David F. Matchett, Justice; Hon. John M. O'Connor, Justice.

Sheldon W. Govier, Clerk; Thomas J. O'Brien, Sheriff.

BE IT REMEMBERED, That on the 20th day of April, A. D. 1942, there was filed in the office of the Clerk of said Court, an opinion of said Court, in words and figures following to-wit:

Mary B. Sevier, Administratrix of the Estate of Albert E. Sevier, deceased,
Appellee,

No. 41808 *vs.*

Charles M. Thomson, Trustee of Chicago and North Western Railway Company,
Appellant.

} Appeal from Superior Court of Cook County

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant under the provisions of the Federal Employers' Liability act to recover for the death of her husband, Albert E. Sevier; upon the

first trial she had a verdict and judgment for $15,000; a new trial was granted and this court, granting leave to appeal from that order, affirmed it. (305 Ill. App. (abst.) 165.) Upon the second trial plaintiff had a verdict and judgment for $20,000, and this appeal is from that judgment.

Our former opinion outlines the facts substantially as follows. Between 9 and 10 o'clock on the night of May 21, 1937, defendant's southbound freight train consisting of 86 empty cars on which Sevier was employed as head brakeman, stalled while going up a rather steep hill about 2 miles north of Buda, Illinois; Sevier was riding in the engine on the fireman's or east side of the train; he inquired of the engineer if he should drop off the train and investigate as to the cause of the stalling; the engineer assented to this and Sevier walked back to see what was wrong.

The evidence tends to show that Sevier decided to cut the train between the 36th and 37th cars. When a train must be cut in two under such circumstances it is uncoupled about the middle of the train and the engine then proceeds with the forward section to the next place on the line where there is a sidetrack and these cars are left there; the engine then returns to the rear section and, coupling on to it, hauls it to the sidetrack where the two sections are then coupled together and the train proceeds on its way. The evidence tends to show that Sevier followed the usual procedure in such cases, closing the angle cocks—one on the rear of the 36th car and the other on the front of the 37th car, then uncoupling the automatic air brakes between the two cars. Defendant says that at this point the next thing to do is to open the rear angle cock, thus setting the air brakes so the rear cars cannot move. Sevier crossed over to the engineer's or west side of the train; the engineer then backed up the train so as to

take the strain off the draw bars and Sevier pulled the pin by using a lever on the side of the car, thus cutting the train at this point. When the process of cutting the train is completed the brakeman ordinarily signals the engineer to go ahead with the forward section of the train.

Defendant argues that plaintiff failed to set the brakes on the rear section by reopening the angle cock, which would set the brakes, and that as the result of this failure, when the cars were uncoupled the unbraked rear section started to move down hill and that to stop this Sevier went between the two sections and closed the angle cock on the car at the head of the rear section, thus stopping it—witnesses say suddenly, and that while doing this he was caught between the stopped rear section and the backing forward section and crushed to death.

The evidence showed that there were two movements backward of the train. The first enabled Sevier to pull the pin and uncouple the cars. The jury could properly believe that when this was done he signaled to the engineer with the lantern he was carrying that the train had parted. Defendant argues this signal was to back up, but there was testimony to the contrary. It would be hardly reasonable to believe that after the cars had been uncoupled Sevier would signal the engineer to back up, for there would then be no necessity for backing the forward section of the train. It would be much more reasonable to believe that the signal to the engineer was to indicate that the cut had been made so that the forward section could proceed on its way to the next siding.

This is not inconsistent with defendant's argument that Sevier, before uncoupling the cars, did not close the angle cock on the rear section and hence it commenced to move down the hill. Sevier could reasonably assume that when he uncoupled the cars and had so signaled the engineer, the forward section of the train would proceed southward

and he could safely proceed to close the angle cock on the first rear section car thus stopping it, wholly unaware that the forward section, with no signal from the engine, was backing toward the rear section. This is supported by the fact that Sevier's back was toward the forward section, which backed between "20 and 60 feet" before it ran into the rear section which was braked to a standstill. If the forward section had not so backed the accident would not have happened.

In any event we cannot say that the jury could not reasonably accept plaintiff's version of the manner in which the accident happened. Certainly all reasonable men would not agree that the accident was caused solely by the negligence of Sevier and that there was no negligence on the part of the engineer of the train.

Plaintiff also says that defendant's rule 14 requires that a signal to back be acknowledged by the engineer with three short whistles of the engine, and that even if Sevier's signal to the engineer was a back-up signal this rule was violated by the engineer's failure to sound the whistle. In many cases involving similar facts judgments in favor of the plaintiffs were sustained. *Waiswila* v. *Illinois Central R. Co.*, 220 Ill. App. 113, 118; *Central R. Co. of N. J.* v. *Colasurdo*, 192 Fed. 901; *Gaffney* v. *N. Y. Consolidated R. Co.*, 220 N. Y. 34; *Musgrove* v. *M. & L. S. Ry. Co.*, 259 Mich. 469; *Lancaster* v. *Fitch*, 239 S. W. (Texas Civ. App.) 265. In *Roth* v. *Schaefer*, 300 Ill. App. 464, 469, we said: "In a case based on defendants' claimed negligence it is not necessary that the evidence demonstrate such negligence, 'but responsibility for the accident must be determined upon the reasonable conclusions to be drawn from the evidence'." (Citing *Denny Bros.* v. *Goldblatt*, 298 Ill. App. 325 and *Union Pacific R. Co.* v. *Huxoll*, 245 U. S. 535.)

Defendant argues at some length that there were reversible errors in the rulings of the trial court in the admission

and exclusion of evidence. While some of these rulings might be open to slight objection, yet we find nothing of sufficient importance to demand a reversal.

Neither were there errors in the giving or refusing of instructions. They were for the most part passed upon and approved in our prior opinion in this case. (305 Ill. App. 165.)

We find no procedural errors which would require a reversal. The decisive questions presented relate to the facts, and as two juries in this case have found for the plaintiff and the verdict is reasonably consistent with the evidence, we would not be justified in reversing for a third trial.

The judgment is affirmed.

AFFIRMED.

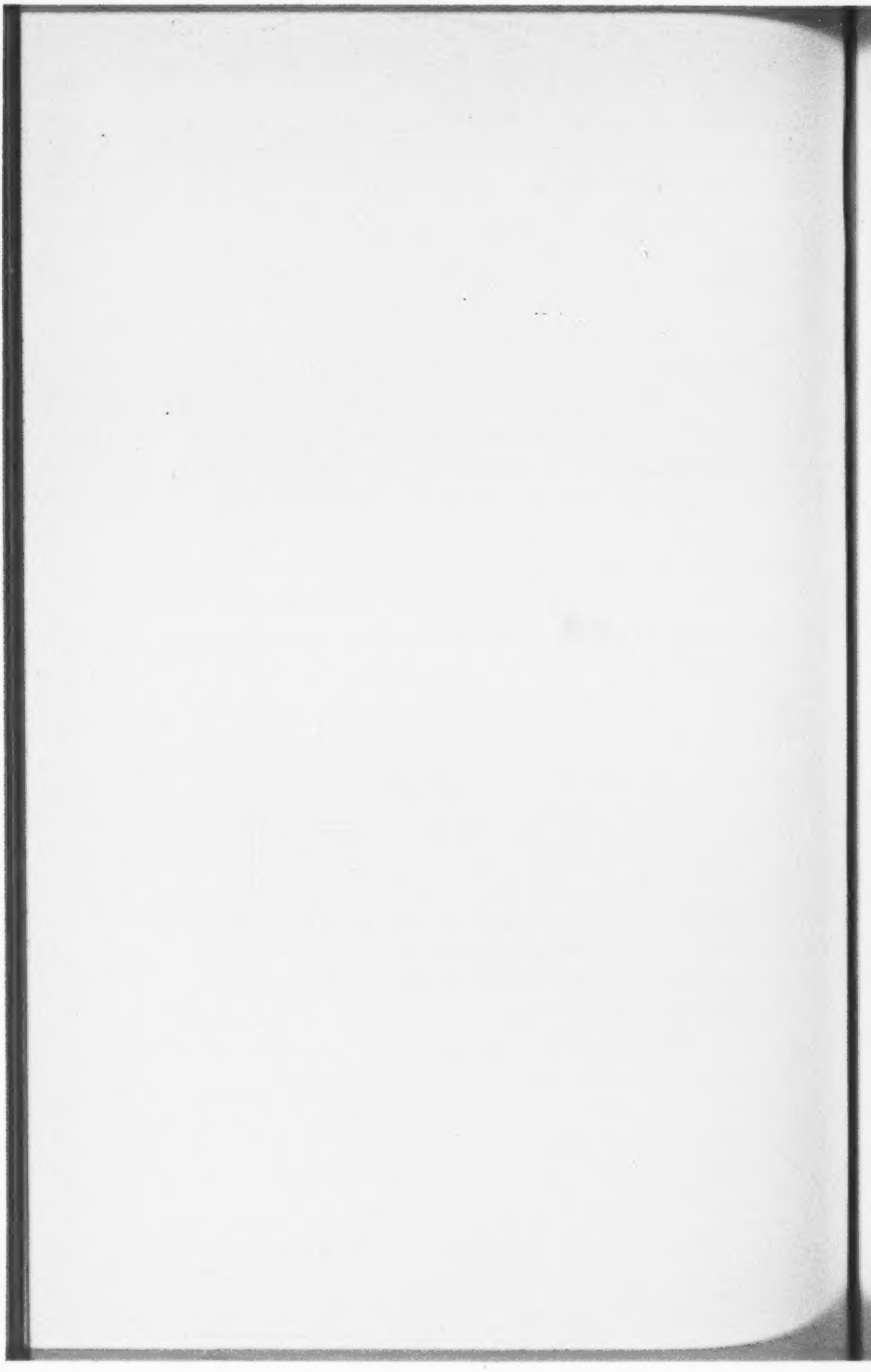
MATCHETT AND O'CONNOR, JJ., CONCUR.

I, Sheldon W. Govier, Clerk of the Appellate Court, in and for the First District of the State of Illinois and keeper of the records, files and seal thereof, Do HEREBY CERTIFY That the foregoing is a true copy of the opinion of the said Appellate Court in said cause, as appears of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, at Chicago this 14th day of December in the year of our Lord one thousand nine hundred and forty-two.

(Seal)

Sheldon W. Govier,
Clerk of the Appellate Court of the First District, Illinois.



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IN THE

Supreme Court of The United States

OCTOBER TERM, A. D. 1942

No. 573.

CHARLES M. THOMSON, Trustee of the CHICAGO AND NORTH WESTERN RAILWAY COMPANY (substituted for Charles P. Megan, Trustee),

Petitioner,

vs.

MARY B. SEVIER, ADMINISTRATRIX OF THE ESTATE OF ALBERT E. SEVIER, DECEASED,

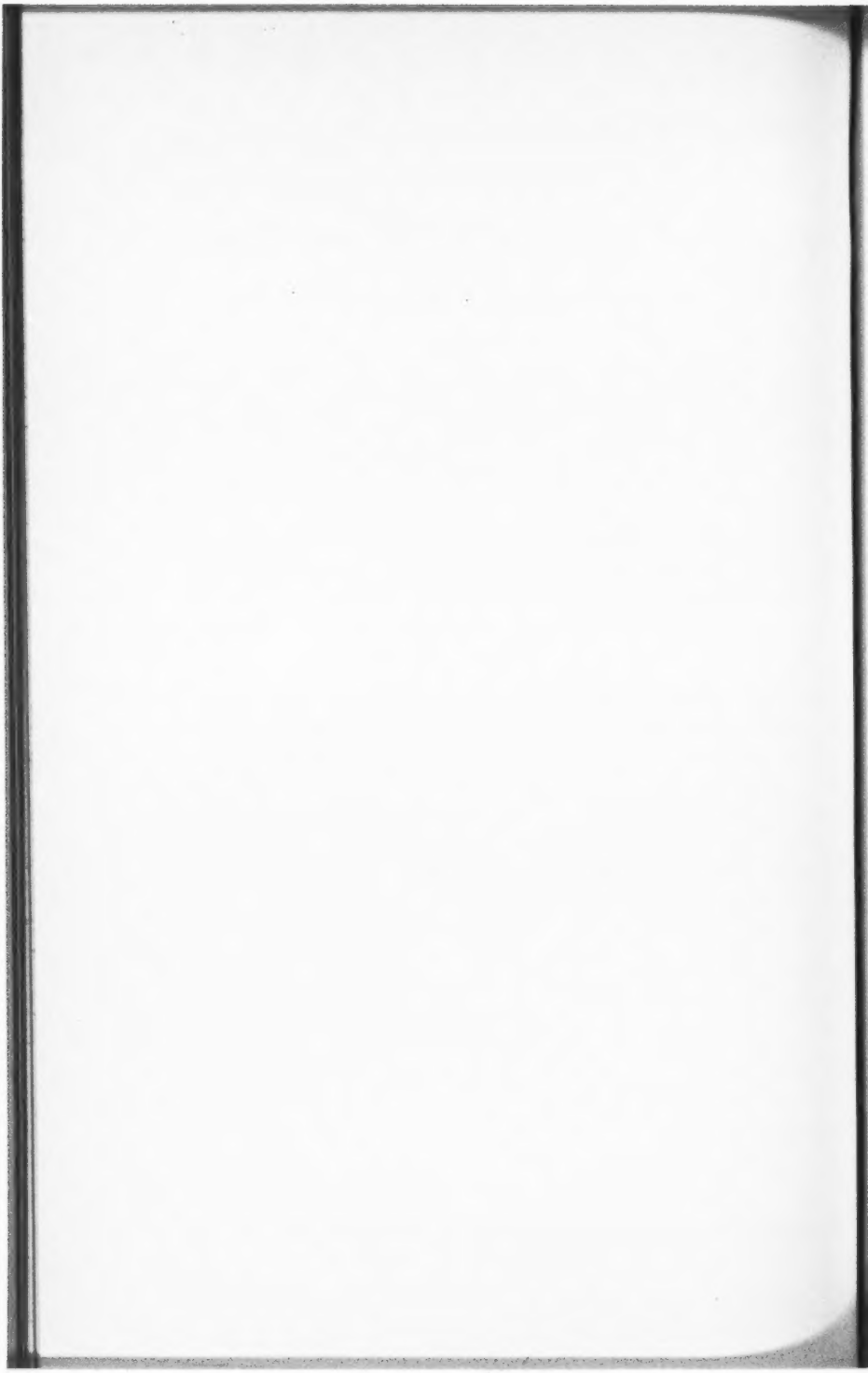
Respondent.

REPLY BRIEF.

WILLIAM T. FARICY,
NELSON J. WILCOX,
Counsel for Petitioner.

DRENNAN J. SLATER,
Of Counsel.

MC CORMICK AND HENDERSON, INC., CHICAGO



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Respondent's attorney has completely ignored the well established proposition of law set out on page 14 of our petition, that if under the evidence a finding of no negligence is as consistent (and certainly more so) as a finding of negligence, no jury question is presented, and it is the duty of the trial judge to direct the verdict.

In lieu of trying to answer this argument, he advances the "reasonable men" rule. As he urges it, the "reasonable men" rule means, not whether there is any evidence of legal weight to sustain the verdict, but whether he has succeeded in so muddying the waters that the supposed

reasonable men are not able to tell whether or not there is any such evidence. He loses sight of the fact that respondent had the burden of proving (a) how the accident happened, (b) that petitioner was negligent, and (c) that such negligence was the proximate cause of the death. He reverses the positions of the parties and says that the burden of proof was on the petitioner to so prove *his* theory of the facts as that "all reasonable men must agree" with it.

Left wholly unanswered is the vital question: Assuming that petitioner's theory is not correct, then where, in this record, is there any proof or inference of negligence on the part of petitioner? Where otherwise is there any proof or inference as to (a) how and when the 36th and 37th cars of this train became separated, (b) how Sevier got between the couplers of those cars, (c) why he went between them, and (d) what created the space between those couplers, if the rear section didn't move faster than the front section after Sevier pulled the pin.

While it was not up to petitioner to prove to the satisfaction of all reasonable minds that the accident happened from any particular cause or in any particular way, petitioner did prove it by undisputed affirmative evidence. The burden of proof was on respondent, and the only charge of negligence upon which she made out a semblance of a prima facie case was that the engineer failed to blow his whistle before backing up in response to Sevier's slack back signal, which depended entirely upon a rule of the company which had no bearing on the case and the violation of which was not a proximate cause of the accident. A reading of respondent's answer amply demonstrates that there is no reasonable inference to support any claim of the respondent. Here is opposed only speculation and conjecture to proved facts and *all* the reasonable infer-

ences. Imagination and sympathy do not support claims of negligence.

On page 3 of respondent's answer it is asserted that the inspection that was to be made by Sevier required not less than ten minutes. This is a plain misstatement of the evidence. The fact of the matter is that Keohane, the conductor, testifying in answer to questions asked by respondent's counsel, had said that an inspection of the whole train would take about ten minutes, and at the end of such an inspection the inspector would report to the conductor. However, both he and the engineer, who had said that deceased got off the engine to make an inspection, amply cleared up any confusion that might reasonably exist between that kind of an inspection and the kind of an inspection which deceased left the locomotive to make on the occasion in question. Although Keohane described a full inspection of the whole train, he also described the kind of an inspection a brakeman would make "when it becomes apparent that the train is about to stall in slowing down, and he gets out of the cab of the engine and he goes back to make an inspection" (R. 73, 77). In such circumstances the brakeman would not inspect all of the brakes back to the caboose. He would inspect them only to the place where he decided to make the separation in the train. It would seem from respondent's brief that her counsel thinks that on the occasion in question in this case, deceased got out of the cab of the engine for the purpose of inspecting the whole train. That he is not justified in any such thought is clear from the testimony of all of the men on the train that each of them knew that the train was about to stall. The contention is contrary to the established fact that Sevier did not inspect farther back than to the point where he did actually prepare to make the cut and then signal the engineer to slack back so that he could complete the cut by uncoupling the cars (R. 77, 81). This, and all of the other

of counsel's contentions, is based upon just such misstatements as this.

On page 3 of respondent's answer an effort is made to charge petitioner with negligence because, before deceased could have completed the inspection of the train and within a few minutes after he got out, the engineer without receiving any signal backed his engine to bunch the slack on the train and attempted unsuccessfully to go forward. What was done at that time can have no bearing on the issues involved. Nevertheless at the bottom of page 3 of the answer, respondent asserts that Sevier uncoupled the cars while the train was thus moving backward immediately after the first time it stalled. It is undisputed that that backward movement was but part of an attempt by the engineer to get the whole train started and "make" the hill without "doubling," that the effort was unsuccessful, and that the following forward movement resulted in gaining only a few feet, when the whole train again stalled (R. 125, 15, last two lines 16, top four lines; 18-19, 20, 26, 28, 44-5, 68-9) "stretched out and taut," in which position it was held for several minutes (R. 125) by the independent engine brake, until Sevier gave the slack-back signal to the engineer. If the pin had been pulled on the first backward movement it would have completed the "cut," and the next forward movement would have been that of the front section only, which *could not have stalled*, but would have gone on its way, as it did after the accident had happened (R. 91, bottom). That the rear section did, at some time, start down hill is not denied. If that did not happen until after Sevier's signal had been given and the engineer had backed the front section against the rear section, then the accident had happened before the rear section started back. This is utterly impossible, for it is undisputed that after the rear section started back and had gone a distance of about half

a car length its automatic brakes were applied, which could not have been brought about by anybody except a *still alive* Sevier (R. 48-9, 50, 55, 77, 78).

On page 4 of the answer respondent argues that the signal given by Sevier was not a backup signal but a "train is parted" signal. The only basis for this argument is that petitioner's engineer is supposed to have testified on his pre-trial deposition that it was his idea that with the modern electric lantern trainmen give the backup signal with arm extended. Although he did not testify that the signal he got from Sevier *was* given with his arm extended, yet counsel for respondent seized upon that testimony and a picture in the rule book as indicating that the train *had* parted. On the trial of the case the engineer appeared in person and testified on the witness stand. His attention was called to his testimony as to his own idea as to how to give a backup signal, and he thereupon testified that at the time he illustrated the backup signal in the giving of his deposition he was seated in a chair at the end of a table with his legs under the table, and that he then and there did actually give a backup signal, but with his arm extended at full length; that he did not give a train has parted signal, and that, in the position he was in, he could not, as a physical proposition, give a "train has parted" signal, which is the indubitable fact. Counsel for respondent knows that the signal illustrated by the engineer, in giving his deposition, was in fact a backup signal, and not a train has parted signal. The engineer further testified, at the trial, that the signal he got from Sevier was a lantern signal; that he could see no part of Sevier's body or arm; that he does not know what the position of his arm or body was; that the signal he gave for respondent's counsel (R. 79) was a backup signal; *that so far as he knows it was given by Sevier exactly in accordance with the picture in*

the Rule Book, Plaintiff's Exhibit D, rule 12-d (R. 80); that the train had *not* parted before that signal was given or at any time after it started up Buda Hill.

If that picture, rule 12-d, requires the back-up signal to be given only at half arm's length it is a rule which is impossible of application at night. It would mean that the receiver (this engineer, for instance) must not act on the signal indicated by the lantern or light unless he can see the giver's arm and be sure that the arm is in the position shown in the picture. If applied in the instant case no cut of the train could have been made until and unless the engineer had first determined the position of Sevier's arm when giving the slack-back signal — a physical impossibility, requiring no argument to demonstrate. It was black dark, Sevier was approximately 1420 feet away from the engineer, and the latter could not see him or his arm or any part of either, but he could, and did, see the signal made by the light, and it was a back-up signal. This is not disputed by any evidence or reasonable inference and is beyond disputed.

The signal "train is parted" means that there has been an accident, that the train has "pulled apart" or "broken in two" without intention, the effect of which is to automatically set the brakes on every car in the train (R. 45, 60, 62, 77, 111, 114, 119). No such thing had occurred. Furthermore, there is no evidence or inference in the record that backing up is not the proper response to a "train is parted" signal.

At the top of page 5 of the answer respondent claims that the testimony shows that the engineer backed up for a distance of some 20 to 60 feet without the application of brakes until he ran into the rear fifty cars of the train on which the automatic brakes had been set. From the outset counsel for respondent has endeavored to create a fog about the engineer's "guess" that the whole backward movement

moved 20 to 60 feet. There is no substance, however, to this argument. The "guess" was given under pressure, after the witness had repeatedly stated that he could not make an estimate of any value. The testimony was:

> "I backed until there was no pull on the drawbars. As to how far back I went it would be only guesswork, because I was busy watching the signal, expected another signal, and it would only be guesswork, only a guess. * * * I continued to watch this lantern that I had seen make the circle. * * * He gives a signal and you act on that signal until you get a different signal. I could give a *guess* on how far back we had gone when we came to a stop, probably from a half to a car length and a half, or 20 to 60 feet." (R. 20, 21.) (Italics ours.)

From this it is seen that as an estimate the guess is such that respondent's counsel has no right to seek to take advantage of it, even though, as a matter of fact it was not such a bad guess. The movement closed up at least 360 inches or 30 feet of slack (R. 118, 125-6), and, after Sevier pulled the pin, almost another 20 feet before he went between the couplers to repair his failure to first set the brakes on the rear section. Add another 10 inches for the slack between the engine and the first car, and the actual *minimum* normal distance of the movement would be 30 feet and 10 inches. It was black dark and the engineer was busy, and he was acting on signals from Sevier, who had full charge, not only of directing the engineer, but of the whole operation of cutting the train in two for doubling it over the hill. In the circumstances, to contend that the engineer should have been put on notice that Sevier was "in a position of danger" because the backward movement was guessed to be from 20 to 60 feet instead of 31 feet is no better than absurd.

On page 5 of the answer counsel calls the court's attention to the fact that deceased was lefthanded, with the ap-

parent intention of making this court believe that the right arm of a left-handed man is perfectly useless; that he is, in effect, a one armed man. Of such stuff is his whole case made.

On page 6 of the answer respondent tries to make out negligence against petitioner by charging that no effort was made by the engineer to apply the brakes on the second backup movement, and repeats this argument on page 10 of the answer by saying that "if petitioner's engineer had backed only the distance necessary to take up the slack to the 36th car and had then applied the automatic brakes and held the slack the deceased would not have been killed." At no time within which the engineer might have applied the brakes and stopped the front section was Sevier in a position of danger. At a matter of law the evidence fails to show, by a preponderance or at all, that ordinary care, or any other degree of care, required or even suggested that the engineer should have set the brakes.

In the ordinary course of a doubling operation, the cut being performed in the usual way, the man making the cut, *cannot*, at any time, be in a position of danger. He cannot *get* between the couplers until he has uncoupled them, and if, before doing that, he has set the brakes on the rear section, he cannot *then* get between the couplers, for his "pulling the pin," merely creates a situation in which the front section can be pulled away from the rear section at the point of the cut; it does not *separate* the couplers at all. It was not until Sevier's light had disappeared, an instant before the front section bumped into and was stopped by the rear section, and had stayed out of sight of the engineer for an unusual length of time, that the engineer was put on notice that something must have gone wrong. Up to then, so far as he could know, everything had been normal and in accordance with the usual procedure. There was nothing

about the distance of the backward movement to excite apprehension on the part of the engineer, for there, all of the time, during all of the movement, was Sevier's light, outside the cars, and the engineer knew that in the usual course of things the man in charge, who was Sevier himself, would give him another signal when it was appropriate and he chose to do so.

Sevier signaled for a slack-back and got it. He was outside the cars and stayed outside until the slack got back to where he had chosen to make the cut, whereupon he uncoupled the cars, and because he had failed to set the brakes on the rear section, that section started down hill and he went between the cars and between the couplers, his lantern or light (which was all of him the engineer could see) disappeared and the front section was stopped by the rear section, which would normally happen when the slack got back to it if the brakes had been set on that section before the uncoupling was made. There was no reason why the engineer *should* have have applied the brakes, and it would not have been possible even for a clairvoyant engineer to do anything to stop after the pin was pulled before the front section caught up with the rear section. Moreover, even though it were physically possible for the engineer to set the brakes on the front section, at any time after the slack-back movement started, there is no evidence at all that if he had done so, after moving back some purely speculative distance, the effect of it would have been to prevent Sevier's being caught between the couplers.

On page 6 of the answer respondent argues that petitioner's rule 14 required that on a slack-back movement three short whistle sounds be given. It would seem to be obvious that petitioner's Rule 14 applies only to a train movement and to be for the benefit of the conductor and

brakeman at the rear of the train. A mere slack-back of the cars in the front section of a doubling operation is no *train* movement, and is not communicated to the cars beyond the point of the "cut," nor felt or seen at the caboose, if the brakes on the rear section are set before the pin is pulled. The lack of a whistle preceding this slack-back cannot possibly have had any causal connection with the death of Sevier. This was a wholly false issue in this case.

On page 6 of respondent's answer the statement is made that men making couplings and making uncouplings go between the cars * * * to manipulate the angle cocks. The reference is to p. 120 of the abstract. But the witness actually said, and the meat of which is omitted by counsel in his answer, that "men making couplings and uncouplings go between the cars * * * to manipulate the angle cock, but only when they are standing still. They would not go in when a train is moving." This matter of the necessity for a brakeman to get his body or part of it between the cars to manipulate the angle cocks is, in fact, so simple that counsel's attempt to fog it is unworthy of attention. Take, for instance, the angle cock at the rear end of the rear car of the front section in this train. It was on the engineer's side of the coupler. The coupler is in the center of the car. The angle cock is between the outside of the side wall of the car and the coupler. No pretense, or claim or suggestion has ever been made by the defendant that a brakeman, standing in the clear of the cars on the engineer's side, would not have to put a part of his body, i. e., his forearm, or perhaps more of his arm, between the *cars*, to reach that angle cock. However, on the other hand, there can be no question whatever as to whether, to reach that angle cock, such a brakeman would have to put his body, or any part of it, between the *couplers* of the cars—he *couldn't* do it while the cars were coupled.

On page 7 of the answer respondent argues that it would be presumed that Sevier exercised due care for his own safety. In this case the so-called "death presumption" did not exist at the close of all of the evidence. As said by the Supreme Court of Illinois in *Nelson* v. *Stutz*, 341 Ill. 387, 397:

> "Presumptions are never indulged where established facts exist. * * * when evidence is produced which is contrary to the presumption, the presumption vanishes entirely."

At the top of page 10 of the answer respondent again argues that there was negligence because the movement was made without warning, and ignores the argument on page 17 of petitioner's brief that as a matter of law there is no duty on the part of an employer to warn his employee of something he knows all about, and that failure to warn in such a situation is not actionable negligence. Obviously, exactly the same thing would have happened if the engineer had whistled—whistling would not have set the brakes on the rear section; would not have prevented Sevier's pulling the pin, or have made him set the brakes on the front section before going between the couplers. He couldn't uncouple until the slack got back to where he was, and the evidence is undisputed that he did uncouple, which completely disposes of any claim that lack of a whistle signal had any causal connection with the accident.

On page 10 of the answer respondent finally argues that the jury would have been justified in refusing to believe that petitioner's engineer saw any back up signal. It is to be noted that the engineer was called as respondent's own witness and respondent relied on him to make out a prima facie case. Counsel is in no position to ask to eliminate the

important and controlling parts of the testimony of this witness and to assume a state of facts not warranted by the evidence.

CONCLUSION.

What this court said in *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 343, is here appropriate:

> "We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.' *Pleasant* v. *Fant*, 22 Wall. 116, 120-121. And where the evidence is 'so overwhelming on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 660."

Respectfully submitted,

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